# Central Law Journal.

ST. LOUIS, MO., OCTOBER 24, 1919.


## CAPITALIZATION OF PROSPECTIVE PROFITS.

In this day of wild cat corporate organization it is well occasionally to warn counsel to keep their feet upon the earth and not attempt to capitalize the "blue sky" or the circumambient atmosphere.

In spite of the liberality of some state corporation laws, such as those of Delaware, it is still impossible to make that capital which is not capital, such, for instance, as prospective profits. In the recent case of Wallace v. Weinstein, 257 Fed. 625, it was held that an issue of one hundred thousand dollars of stock in return for the transfer to the corporation of certain contracts with automobile manufacturers, alleged to be worth fifty thousand dollars, was not a fair transaction and that the stock would not be regarded as paid for. On this important point the U. S. Court of Appeals said:

"If such contracts were transferred to the corporation for its stock—even at the value subsequently placed upon them—then the stock at the best was only half paid for. But there is nothing contemporaneous with the stock transaction which indicates that the agency contracts were assigned to the corporation in part consideration for the stock. But if they were so assigned, the contracts—which later proved valueless—if property in any sense—were not property of a kind for which stock can be issued. They contained nothing more substantial than a promise of profits. Contemplated profits cannot be a basis of capitalization of a corporation under the Delaware law, for neither stockholders nor directors have any right to make a present capitalization of prospective profits. See v. Heppenheimer, Untermeyer et al., 69 N. J. Eq. 36, 61 Atl. 843. Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618. John W. Cooney Company v. Arlington Hotel Company (Del. Ch.), 101 Atl. 879. The agency contracts cannot be regarded as consideration for the stock in any amount."

Corporate stock can be issued only for cash, property or services. In the absence of statute payment for stock can be made in either way. Where property is received in payment for stock, it is customary to have the stock appraised by disinterested appraisers, although, as between the stockholders themselves this is usually unnecessary, as the stockholders themselves, at least those consenting thereto, are bound by the valuation placed on the property. Memphis, etc., Ry. Co. v. Dow, 120 U. S. 287.

But all is not gold that glitters; so everything is not property which has value. To be property the value must inhere in the thing itself and not be the result of future effort. In other words, to be property it must have present value, not prospective value. Good-will is property so far as it has a present market value, but not to the extent that it may represent future profits, although that element may enter into the calculation of the present value of the good will. So, also, a *mere* option on a mine is not property. State v. Hogan, 163 Mo. 43. We have italicized the word "mere" because there may be some question whether an option, under some circumstances, may no represent an intrinsic value (inhering in the option itself).

For the protection of stockholders property should be appraised at the time of its acceptance and its value should be based on the amount which could be realized on a fair sale. Anything without present value should not form the basis of corporation capital. To capitalize an oil lease on the basis of expected profits rather than the actual market value of the lease (which, in most cases, would be nil) is a fraud upon the investor. It encourages a man to reap his harvest before he has planted it. The effort to capitalize the dreams and anticipations of promoters, should be sternly discountenanced by the courts. Any other attitude will destroy public confidence in stock issues as an investment.

## NOTES OF IMPORTANT DECISIONS.

AUTHORITY OF AN AD INTERIM JUDGE TO PASS SENTENCE AFTER THE RETURN OF THE REGULAR JUDGE.—One of the confusing questions of law, to many judges and lawyers, is, what is the power of an interim judge to continue to exercise the judicial power of the court after the regular judge has returned and is ready to assume his duties? If the regular judge should return in the midst of a trial it is not infrequently insisted upon that he conduct the trial, and that the special judge has no further right to act in the matter. This question is discussed by the Court of Appeals of the District of Columbia, in the recent case of Shore v. Splain, 258 Fed. Rep. 150.

This case was an application by the plaintiff for a writ of habeas corpus to secure his release from imprisonment on a conviction in a police court for betting on a horse race, in violation of the statute. The trial judge took sick at the beginning of the trial, and a special judge was designated to try the case. The case had been tried and the defendant convicted. A motion for a new trial was pending when the regular judge returned. The special judge, however, after the return of the regular judge, handed down his decision, over-ruling a new trial, and then sentenced the defendant to 90 days in jail. The defendant insisted that he was illegally restrained of his liberty, since he was sentenced by a judge, who, at the time the sentence was passed, had no power to exercise the powers of the court. The Court of Appeals, in refusing to grant the writ, held broadly that it is not only within the power of a special judge, but it is his duty, to continue to exercise the judicial powers of the court until he has disposed of the business of the case which he has begun. On this point the court said:

"According to the appellant the moment the disability of the regular judge is removed, the power of the designated or special judge ceases, even though he may be in the midst of an important trial, thus rendering nugatory all that had been done in the trial up to that time. Such a construction would lead to great public inconvenience and should not be adopted if it can be avoided. Hawaii v. Mankichi, 190 U. S. 197, 23 Sup. Ct. 787, 47 L. Ed. 1016; Lau Ow Bew v. United States, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; Bird v. United States, 187 U. S. 118, 124, 23 Sup. Ct. 42, 47 L. Ed. 100.

"It was undoubtedly the intention of Congress in providing for a temporary judge, that he should perform the duties of the position during his incumbency and complete any work entered upon by him before he withdrew from the place; otherwise, as in the case of a trial, much of his effort might come to naught if the return to duty of the regular judge had the effect of terminating his authority, and thus the purpose of Congress in providing for a substitute judge would be defeated in many cases. The fact that this interpretation may authorize the presence temporarily of three *de jure* judges of the court does not militate against it, for Congress has the power to provide for as many judges of the court as it may think proper."

This question has been raised not infrequently in the state courts and the authorities are in harmony with the position taken by the court in the principal case. State v. Stevenson, 64 W. Va. 392, 62 S. E. 688, 689, 19 L. R. A. (N. S.) 713; State v. Bobbitt, 215 Mo. 10, 30, 114 S. W. 511; Bohannon v. Tabbin (Ky.), 76 S. W. 46, 49; Bedford v. Stone, 43 Tex. Civ. App. 200, 95 S. W. 1086; State ex rel. v. Williams, 136 Mo. App. 330, 336, 117 S. W. 618; Mayer v. Haggerty, 138 Ind. 628, 38 N. E. 42; Fisher v. Puget Sound Brick, etc., Co., 34 Wash. 578, 76 Pac. 107.

In the Stevenson case, which involved the passing of the death sentence in a murder case, the defendant pleaded guilty before the special judge, who took time thereafter for a consideration of his judgment. While he was doing so the regular judge returned, assumed the bench, and sentenced the prisoner. The statute under which the special judge was appointed provided that he should serve in the absence of the regular judge. It was assumed that the moment the regular judge appeared that the authority of the special judge ceased, therefore, that the sentence of the regular judge was valid. The Supreme Court, however, in reversing the judgment, declared "that the return of the regular judge would not oust the special judge of his jurisdiction to try and finally dispose of any case begun before him."

The decision of the court might have been put on the ground that even if the special judge in the principal case was not a *de jure* judge he was at least a *de facto* one. He claimed the right to act as one after exercising the functions of a judge in the court and by virtue of his appointment. No one questioned his right to exercise the power which he had assumed, not even the appellant himself. "The result of the authorities is," says the Supreme Court of the United States, in Ex parte Ward, 173 U. S. 452, 19 Sup. Ct. 459, that "the title of a person acting with color of authority, even if he be not a good officer in point of law, cannot be collaterally attacked."

## REMOVAL OF SUITS FROM STATE TO FEDERAL COURTS—A SURVEY OF THE STATUTES.

In the Central Law Journal for April 4, 1919, appeared an article upon the chaotic state of administration of the Removal Statutes, which showed, that no matter what the meaning of Congress, its purpose had failed because of the radical diversity of construction in various districts and circuits. This failure was the subject of a recent report by a Committee of the American Bar Association, and it was discussed by the conference of delegates from State and local Bar Associations, at their recent meeting in Boston in September. This conference passed the following resolution:

Resolved that State and local Bar Associations be urged to take action looking to recommending such amendment of the existing provisions of the Statutes of the United States for the removal of suits from State to Federal Courts that the meaning of terms now leading to uncertainty and disparity of administration shall be made more certain.

And further that in such removals so far as may be deemed practicable the same option as to a trial in a United States Court be secured to a defendant within the limits of the judicial power of the United States as is now secured to a plaintiff in instituting his suit.

As there is no uniform judicial construction and the decisions under the present law are irreconcilable, and the practice presents every conceivable variety of inconsistency, it cannot be successfully argued that the law has received a workable construction and should therefore be let alone. It has been repeatedly pointed out that the logical result of some of the decisions is to nullify a right of removal which is expressly granted. Any reasoning which produces such results must be faulty, and judicial decisions are not lacking which point to the foundation of the error. Of these, it seems to me that the most convincing is the opinion in *Louisville & N. R. Co. v. Western Union Tel. Co.*[1] in the Eastern District of Kentucky. The most of the courts which have considered the subject in recent years have failed to give weight to the history and purpose of the removal acts now incorporated into the Judicial Code; and, instead, have treated the code as though it were a new enactment, necessarily consistent in all of its parts.

It is interesting to approach the right of removal historically; and this method offers a substantial and proper construction.

The Constitution vested "the Judicial power of the United States in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish";[2] and defined the limits of "the judicial power."[3]

Any controversy within these limits is within the judicial power of the United States, and any one having a controversy within these limits should have a constitutional right to invoke the exercise of the power. It would be entirely logical to contend that the exercise may as well be invoked for defense as for attack, and that therefore when one has a controversy within the limits of the judicial power of the United States he may insist that it shall be determined by that power. So far as I am aware, this proposition has not been broached except incidentally in Re Cilley,[4] where it was said that the position that the right of removal exists under Art. III, Sec. 2 of the Constitution and cannot, therefore, be abridged by Congress or denied by the court is not tenable.

If Congress had been as jealous for the judicial power as the courts have been jealous for the exclusive field of Congressional power, it would have made the Removal

(1) 218 Fed. R. 91.
(2) Art. III, s. 1.
(3) Art. III, s. 2.
(4) 58 Fed. 977. See also Martin v. Carter, 48 Fed. 596, where it was said: ". . . . although the Constitution may give this right of removal, yet the Constitution does not act by its own vigor in such matters."

Statutes as broad as the judicial power of the United States; and if the courts had been as jealous for their own power as for that of Congress, they would not have hesitated in the exercise, not of statutory power, but of Constitutional power, to have issued a writ of prohibition against the invasion of the field of that power by a state court.

Congress has, however, never made the Removal Statutes coextensive with the judicial power, and the courts, for the most part, have not construed the statutes in a broad spirit; with the result that a plaintiff may frequently choose his forum, either state or Federal, and yet a defendant may be deprived of the advantage of the Federal judicial power and of a similar election. The Constitutional power having been extended to *controversies*, it would seem that defendants as well as plaintiffs should be entitled to invoke it; but hitherto the courts have not been astute to preserve a jurisdiction which they might have claimed under the Constitution, nor even under a broad interpretation of the Removal Statutes. Indeed, they have in many instances been astute to avoid the jurisdiction.

It is reasonable to contend that when different laws were consolidated into the Judicial Code, it was not intended to give the constituent elements in the code any greater effect between themselves than the separate laws had upon each other before the consolidation; codification is for convenience, not ordinarily for a change of meaning of preserved constituents.

To apprehend the intent and therefore the meaning of the consolidation, it would seem wise to study the meaning of the constituent parts before the consolidation: the courts have been too apt to look solely at the various parts of the Judicial Code as though they were intended to operate as a single contemporaneous statute interoperative in all of its parts, and then to apply analogies between original suits and removed suits for restrictive purposes but not for permissive purposes, until there is no uniform principle uniformly applied.

A historical review of the removal statutes is a substantial aid in the definition of the right of removal under the Judicial Code, and should, it seems to me, necessarily lead to a liberalization of the right of removal beyond the limitations judicially imposed upon it by many modern decisions.

By the historical method we can arrive at what seems to be the true meaning of the present removal statutes.

The Constitution provided that the judicial power of the United States should extend to all cases in law and equity arising under the Constitution, laws of the United States, treaties under their authority, and affecting ambassadors, other public ministers, and admiralty and maritime jurisdiction;[5] and also to controversies (not *all*) to which the United States shall be a party, and between two or more states, and between a state and citizens of another state, and between citizens of different states, and between citizens of the same state claiming lands under grants of different states, and between a State, or the citizens thereof, and foreign states, citizens or subjects.

It might be contended that as to those enumerated classes where the word *all* is used the federal judicial power is exclusive of the states, and that where it is not used such power is concurrent, either by reason of this studied distinction or by virtue of the reservation to the states or the people of the powers not delegated to the United States nor prohibited to the states. It might also be contended that if the jurisdiction is not exclusive but concurrent, that court which first obtains jurisdiction may retain it. But none of these logical contentions has received any substantial support from Congress or the courts; the removal statutes have defied any claim of jurisdiction first obtained and have never pro-

(5) Art. III, s. 2.

vided for the removal solely of those controversies with respect to which the Constitution uses the word *all*, nor to the removal of all of those falling into the other classes; they have cut across both classes; and now, by the cross application to removed cases of restrictive provisions relating to the district in which a suit may be brought by original process, certain cases described in the statute as removable, have become irremovable or only removable with the consent of the plaintiff, and the plaintiff thus has his option to invoke the judicial power of the United States, while the defendant must have the plaintiff's consent before invoking it, though neither the Constitution nor the letter of the law make this discrimination.

Such a distinction between the choice of a plaintiff and the coercion of a defendant is foreign to the spirit of our institutions, and is either the result of Congressional legislation conceived with the purpose to discriminate or else of a narrow judicial policy of interpretation.

The removal policy of Congress falls into epochs, corresponding in a measure to epochs in our national history, and roughly to be distinguished by periods as follows: the formation of the Judiciary, the aftermath of the Civil War, the Revision of the Statutes, the liberalization of 1875, the restriction of 1887, the correction of carelessness in 1888 and the Judicial Code of 1912.

Two of these were codifications, with the usual purpose of codification, the embodiment of existing law without change, save of position or phrase; two were in spirit the antithesis of each other, extension, retraction; one was for the correction of errors of wretched carelessness in draftsmanship or typography; and three were creative efforts, the latter two of them, following the Civil War, supplementing the inadequacy of what had previously sufficed from the foundation of the federal judiciary. There have been other removal acts for the removal of limited classes of suits which are not the subject of this review,[6] because they are not involved in the controversy which has arisen in the courts over the right of removal accorded by the present sections 28 and 29 of the Judicial Code.

In terms sections 28 and 29 are not obscure, they provide a right and a method of removal; the beneficiaries of the right are described by qualification; the method includes an indication of the place of removal; it is the extra imposition of a condition as to place, which has produced the fantastic and asymmetrical results that the courts are still debating. This condition is imported from sections 24 and 51 to 57 of the Judicial Code and the conflict of judicial opinion is over whether and to what extent these imported sections apply to removed cases.

The confusion has arisen over the displacement and rearrangement of parts. The framers of the original judiciary law did not save words by a cross-reference the precise meaning of which allowed controversy; so, also, the Acts of 1866 and 1867 were substantially free from doubt; the three statutes were incorporated into one by section 639 of the Revised Statutes, but by a system of subdivision, the meaning was left substantially clear. An effort at economy of arrangement in the Act of 1875 introduced the first cross reference whereby a right conferred in one section was measured by a method prescribed in another. But no substantial difficulty arose here; a study of the constituent parts enabled the easy identification of them by history and purpose; and to one who took the trouble to study the original statutes, the reason for the change of phrase and its meaning would appear clear. Then came the revulsion of policy in 1887 to relieve overcrowded courts; its fundamental object was accomplished by denying to *plaintiffs*, who had already selected their forum,

(6) Judicial Code Secs. 30-33.

the right to change their minds and their forum. But given the fact that the purpose was restrictive, it has served as the excuse for a variety of judicial construction which could not have been foreseen; and with the introduction and logically unnecessary application of a new principle, fostered by the judiciary, that no suit can be removed which could not first have been brought in the court to which it is removed (by no means a universal principle) and with a new codification, again rearranging the relations of parts of laws, and by leaping from precedent to precedent, we have arrived at a point where logically consistent judicial minds are forced to the dilemma that either the precedents are wrong or else the judiciary have annulled a right within the Constitutional judicial power of the United States and expressly conferred by Congress; some have adopted the precedents and admitted the results;[7] others conceiving that the results are unjustifiable have disregarded the precedents as thus demonstrating their own essential error.[8]

This controversy is not a mere dispute over a forum, which has no substantial bearing upon rights. There are frequently differences of method which result in differences of right and of ultimate consequence to the parties. The nature of defences, the right of jury trial (a sacred fetich), the method and extent of review for error may all differ in the two forums, and occasionally the fundamental law differs. For instance, under the law as administered in the federal courts no right of action may lie,[9] and upon the same state of facts a state law may give a substantial right of recovery.[10] I have known a litigation upon similar states of fact, where non-resident plaintiffs have brought non-resident defendants into state courts in order to apply there a law which they knew would not be applied in the Federal court in the home district of either party; and yet removal of the non-resident controversy into the Federal courts by the non-resident defendant for the application of the law as administered in those courts was an impossibility because of the construction of the removal statutes in that district, though in some other district, on the same facts the removal could have been accomplished and the federal law applied. Thus an astute plaintiff may secure relief in a state court against a citizen of another state in a controversy to which the judicial power of the United States constitutionally extends, when under the general law as administered by the judicial power of the United States there would be no right of recovery. To this extent such a defendant, by the construction put upon the removal statutes, is deprived of a right to resort to the tribunals contemplated by the Constitution for the determination of his controversy, and with the full knowledge that if he could get his controversy before the courts of his country he would succeed, while in the courts of a state to whose laws he owes no obedience he may be defeated by a different system of law. Although in such a case the removal statutes, as construed, afford him no relief, I am not satisfied that his constitutional rights are not invaded, and that he may not still assert them in another manner. But I am convinced that under adequate removal laws, or under an adequate construction of the present laws, his right to present his controversy to the judicial power of the United States would be protected.

Now, therefore, let us see if there are not actually removable cases under existing law, which are denied removal through judicial misconception of that law. In the former article[11] it appeared that there was

(7) Doherty v. Smith, 233 Fed. R. 132; Jackson v. William Kenefick, 233 Fed. R. 130; Mahopoulus v. Chicago, R. I. & Pac. Ry. Co., 167 Fed. R. 165.

(8) Louisville & N. R. R. Co. v. Western U. Tel. Co., 218 Fed. R. 91; Hohenberg v. Mobile Liners, Inc., 245 Fed. R. 169; James v. Amarillo City & etc. Co., 251 Fed. R. 337; Bagenas v. So. Pac. Co., 180 Fed. R. 887.

(9) Old Dominion Copper Mining & etc. Co. v. Lewisohn, 210 U. S. 206.

(10) Bigelow v. Old Dominion & etc. Co., 225 U. S. 111.

(11) 88 Cent. L. J. 246.

such contrariety of decision that all courts could not possibly be right. I now propose to show by history and analysis that the more liberal view is the sound one.

The composite with which we have to deal is an evolution. At the genesis of the federal judiciary provision was made for the removal of suits to the federal courts. Whatever may have been the reason for the scope of the judicial power of the United States, local prejudice, which has figured largely, and perhaps erroneously, in the exegesis of the statutes is not assigned as a reason in the Constitution; nor does it appear from the published reports of the proceedings of the Convention or its Committees that local prejudice was mentioned as a basis for the grant or scope of the judicial power. It might be inferred perhaps that local prejudice would exist against a non-resident, either alien or native, but the invocation of the constitutional judicial power is not restricted to non-residents by the Constitution itself. If the case arises under the Constitution, United States laws or treaties, residence or non-residence, citizenship or non-citizenship is immaterial; if it is a controversy between citizens of different states it matters not which party or whether any party is a citizen of a state where the suit is brought; so it is not the fact that a non-resident is prejudiced that gives the prejudiced party a right; actual prejudice is not the datum for establishing federal jurisdiction. So far as the Constitution is concerned, a plaintiff may sue in his own state in the federal courts a non-resident against whom he might fare better in his state courts; prejudice is not the basis of constitutional power, however it may have figured in statute making or statutory construction.

Whatever might have been reasonably urged at the outset of the Federal Judiciary in respect to a defendant's constitutional right to prevent a plaintiff from evading the judicial power of the United States by bringing a controversy between citizens of different states in a state court, the temptation to test the question was diminished by the grant of a right of removal from a state to a federal court in the Judiciary Act of 1789, which provided for the organization of the courts; section 11 defined the suits which might be brought by original process in the inferior United States courts; section 12 defined the suits which might be removed to them from state courts; there was no cross reference between the sections, and therefore none of the confusion which was later introduced. But latterly the right to remove has been greatly restricted by judicial decision through the unnecessary application of the principle that no suit can be removed which could not be instituted in the same court. As long, however, as the suit is within the judicial power as constitutionally defined there is no necessary connection between the jurisdiction over suits originally instituted and those removed. It might be provided that only one kind of suits could be instituted in the federal courts and a wholly different kind removed thereto, provided both were within the federal power. Therefore the importation of the restriction that only a suit which could originally have been brought in a court can be removed to it, may be a wholly unjustified restriction; whether it is or not, depends upon whether Congress intended that the restriction of one should apply to the other. Courts have overlooked this, and instead of considering the Congressional intent, have treated it as a maxim, that only a suit which could have been originally brought in a court can be removed to it. The essentials of removal in the Act of 1789, were, a suit in a state court (involving $500 or over) commenced by a citizen of a state against a citizen of another state; only the defendant could remove, and the removal must be to a federal court held in the district where the suit was pending. It is to be noted, therefore, that the plaintiff having elected to start in the state court of his own state had no right of removal, and that only his

adversary (possessing the constitutional qualifications) could remove; there was only one district to which it could be removed, not the district of the defendant's citizenship, but, as it chanced, the district of plaintiff's citizenship; not because it was his residence, but because the suit had been instituted there. At that time, there being only one district in a state, the plaintiff's domicile and the district would coincide; later, however, with the multiplication of districts in a state, this identity might have ceased; a citizen of a state might later have instituted a suit against a citizen of another state in a district of the plaintiff's state, in which he did not reside; yet the right of removal would have survived the multiplication of districts in the plaintiff's state and the place of removal would then have been, not the district of his residence, but the district in his state where the suit was pending. The tendency of the judicial mind to confuse the accidental identity and to substitute the residence of the plaintiff instead of the district of pendency as the district of removal, has led to a judicial inclination to restrict the statutory right of removal where the plaintiff does not reside in the district of pendency though in the same state. Again, though it might be inferred that the dangers of local prejudice were present to the Congressional mind, local prejudice is not the prescribed basis of removal, but difference of citizenship in which the plaintiff is a citizen of the state of pendency. If the two parties were both citizens of other states, no removal could take place, though the controversy would still be within the scope of the federal judicial power, and might have been instituted in the federal court, and at that time in the same district, because at that time a defendant could be sued in a federal district where found.

I direct attention to the fact that local prejudice was not the declared basis of removal in the Judiciary Act of 1789, though it might be inferred, because the courts have developed a tendency to adopt the theory of local prejudice as a means of construction.

I further call attention to the fact, which will develop later, that whereas in 1789 a non-resident citizen might be sued *in invitum* in a federal district where found, such is not now the case; and the courts have developed a tendency to similarly restrict the right of removal, though the language of the removal acts as to the district of removal has never changed since the beginning. While the district of removal and the district of original institution chanced to be identical in 1789, Congress could change one without changing the other. But the courts have developed a tendency to think otherwise, and this, curiously enough, has developed into a judicial denial of a defendant's right of removal of a suit in a state court where he does not reside, simply because if he were sued in that federal district now he could object to the district. What was given to him as a shield against being sued in a federal district where he does not reside has judicially been turned into a sword to be used against him to prevent him from enjoying any right of removal if sued in a state where he does not reside (unless his adversary resides in that district of the state). Such limitation of right ought not to be the result of judicial construction. If any such result is to follow it should be from the certain language of legislation.

But we shall show that the legislation does not require such results.

The simple rules of the Judiciary Act of 1789—a local plaintiff, a defendant citizen of another state, removal only by the latter, and only to the district where instituted—remained the law until after the Civil War. And the first innovation was not a substitution but an extension of the right of removal; theretofore, citizenship was an essential element, and, under the construction of the courts, if citizens of the same state were on opposite sides of the record, one defendant citizen of another

state could not remove; hence the beneficent purposes of the removal act were defeated by the device of adding a citizen of the state or an alien as a defendant to prevent removal.

Congress met this device by the Separable Controversy Act of 1866 (Ch. 288). If there was an actual inseparable controversy with citizens of the same state on both sides, it was not within the constitutional jurisdiction of the federal courts as a controversy between citizens of different states, so no removal would avail. But if the controversy could be separated then the separable part might fall within the jurisdictional conditions. Hence the Act of 1866 provided that such a separable controversy might be removed, and it also provided that certain suits not separable, and not theretofore removable, might be removed if the latter class were suits against aliens and suits against citizens of other states for the purpose of restraining or enjoining.

Under the Act of 1866 residence of the plaintiff within the state was not essential to removal by an alien defendant, nor by a citizen of another state if the suit were for the purpose of restraining or enjoining. Therefore the argument that the controlling reason for removal statutes is local prejudice in favor of the plaintiff, has no support except in a limited class of cases: it should therefore not be adopted as a principle of construction, as many courts have done.

There was one class of cases added by the Act of 1866 which has erroneously given it its name, that was the class of separable controversies, but as we have shown, only one of three classes of controversies removable under the act was a separable controversy.

An alien defendant might remove, and a defendant, citizen of another state might remove, a suit to restrain or enjoin, whether the plaintiff was a local citizen or not; and if there were a plurality of defendants and one or more of them citizens of another state, and the suit was not for injunction or restraint, then two additional essentials to removal must exist, the plaintiff must be a citizen of the state in which the suit was brought, one or more defendants must also be citizens of the same state and one or more of them citizens of another state; in such case the non-resident citizen alone could remove. The removal could only take place if there could be a final determination concerning the removing party without the presence of the other defendants. The place of removal was to the district where the suit was pending.

In the case of a removing alien and in the case of a suit to enjoin or restrain, the plaintiff's residence was immaterial, he need not be a citizen of the state where the suit was brought; and therefore the accidental coincidence of identity between residence of plaintiff and district of removal, which happened to be a necessity under the Act of 1789, did not always exist under the Act of 1866. The principle that the removal could only be to the residence of the plaintiff was not universally true, and where it existed, it was an accident: the express indication of the place of removal was not varied, it was the district where the suit was pending, whether it was or was not the residence of any party, except that a separable controversy could not be removed unless both plaintiff and a defendant were citizens of the state where the suit was instituted, though not necessarily residents of the district of removal in case of plurality of districts in the state. Up to this time, therefore, it would not be correct to say that removal was solely the result of local prejudice or solely to a district in which a plaintiff or defendant resided; removal might proceed without implication of prejudice and without the residence of any party in the district, if other essentials existed.

That local prejudice was not the basis of removal was emphasized by the Act of 1867, which was an amendment of the Act of 1866, but not of the Judiciary Act of 1789; the amendment extended no additional rights to aliens, but left them where it found them; it made no change in the right of removal of suits to enjoin or restrain, nor of the right to remove separable controversies; it introduced, however, a new class of removable suits, and it gave the right to remove such suits to either plaintiff or defendant. It thus allowed a plaintiff who had chosen a state forum to remove. The conditions were: one party (whether plaintiff or defendant) a citizen of the state in which the suit was brought, the other (whether plaintiff or defendant) a citizen of another state; the sole ground of removal was such prejudice or local influence that the removing party would not be able to obtain justice in the state court. The place of removal was always the same, the district where the suit was pending. This district had never changed. Once again this district, in case of a plurality of districts in the state, need not be the residence of either party, though at least one of them must be a citizen of the state in which the suit was brought, to set the right of removal in operation.

Thus there were many rights of removal with varying conditions predicated upon different laws, but not universally predicated upon local prejudice nor residence of either party in the district of removal; yet the place of removal was inflexible—it was always to the district where the suit was brought, and if the right of removal existed, the residence of the parties did not determine the places of removal.

Then came the revision of the Statutes (1873) and all of these rights of removal were thrown into one section with one procedure; but the rights and their conditions were not substantially changed by change of phrase or position. The original jurisdiction of the Circuit Courts was enumerated in Section 629; the rights of removal were enumerated in Section 639. The fact that the original jurisdiction and the provisions for removal now appeared in one chapter did not restrict the right of removal; it continued to exist as before. By Section 639 a uniform method of procedure was prescribed for all removals; a single district was named, the district where the suit was pending; several classes of removable cases were enumerated:

1. Against an alien.

2. By a citizen of the state against a citizen of another state.

3. Against an alien and a citizen of the state where brought.

4. By a citizen of the state against a citizen of the same state and a citizen of another state.

5. Between a citizen of the state and a citizen of another state, with conditions of prejudice or local influence.

In each instance the alien defendant or defendant citizen of another state could remove; in case of prejudice or local influence the citizen of another state, whether plaintiff or defendant, could remove. In Cases 3 and 4 the separable controversy with the removing party was removed; in Cases 1, 3 and 5 the plaintiff need not be a citizen of the state where the action was brought, in Case 1 no party need be a citizen of the state where brought.

Thus the law remained substantially made up of the rights originating in 1789, 1866 and 1867, until the pre-existing rights were very substantially enlarged in 1875 (Ch. 137). This act defined the original jurisdiction of the Circuit courts; it prohibited bringing before such courts any civil suit against any person by any *original* process or proceeding in any other district than that whereof he was an inhabitant or in which he should be found, except as therein provided. *Original* process must have been contrasted with something not original and the exception must have meant something. Judges have been found who consider re-

moval original process and who have therefore contended that this act or its successors, by this prohibition so limited the right of removal that though a suit could still be removed only to the district in which pending, it could not, after the passage of this act, be removed to such district unless it also fulfilled the additional condition, either of being the district of which the removing defendant was an inhabitant or in which he could be found. In order to effect this result *original process* must be given a distorted and unusual meaning, the express exception must be disregarded, a preference for aliens over citizens must be imputed, and a restrictive operation given to a statute otherwise obviously enlarging the privilege of removal. Yet it is in this statute that the germs of all of the subsequent confusion rest.

There is no sound reason (unless it be economy) which compels a citizen of another state to submit to the jurisdiction of a court of a state, simply because it is his option not to be sued in a federal court in the same state; yet it is the result of confusing original process with removal that many courts have made it impossible for an alien to remove at all without the consent of his adversary, or for a citizen of another state to remove under the conditions prescribed in the removal provisions without the additional conditions (which he could waive in an original suit, but which absurdly enough not he, but his adversary, must waive in the removed suit).

It is surprising that a provision intended for protection of a defendant should work out to his detriment in a case not described in the section creating the protection, by compelling him to accept in the case not described a condition which he might waive in the case described; yet such is the logic of many courts.

These results are unjust in two respects, they deprive a citizen (or an alien) of the right to resort for his defense to a United States court in certain causes within the constitutional scope of federal jurisdiction, while his adversary has the choice between state and federal jurisdiction and may select that whose view of the law most favors him; and the law is notoriously not uniformly administered in different districts of the same state or even in the same district.

The Act of 1875 did not disturb the local prejudice right of removal; it remained apparently as created by the Act of 1867; so that the Act of 1875 was not a complete judiciary act, nor a complete removal act. It enlarged the right of removal so as to secure it not alone to the defendant, as theretofore (except for prejudice or local influence, where either party already had it), and gave the right to either party, wherever it gave it to one. It seems unnecessary to enumerate the classes of cases in which the right was given; it included suits in which the removing party was sole party and severable controversies of the removing party. It extended the right of removal to any suit of a civil nature at law or equity in which there should be a controversy between citizens of different states, thus removing the requirement in any case mentioned that one party must be a citizen of the state in which the action was brought. In all of these respects it was a liberalizing statute approximating the right of removal to the constitutional scope of jurisdiction. But it introduced one trouble making word in its procedural clause, and it has proved for this reason a veritable Pandora's box for courts, judges, lawyers and litigants. This word has caused more litigation and more uncertainty than any other word I know, and it is the simple word "proper." Theretofore the district of removal had always been designated as the district in which the action was pending. This act, which for the first time devoted different sections to the creation of the right of removal and the procedure by which it should be exercised, enlarged the right in terms, for it increased the cases in which it might be exercised and gave

the right to either party. Yet it granted the right of removal to the "proper district." And hence ensued an endless conflict to determine the *proper* district. Theretofore the district in which the suit was pending in the state court was specified as the district of removal, notwithstanding the suit might not as an original suit have been effectually instituted in the United States court in that district. But now began a judicial search for the "proper" district, which has never yet ended. Some judges say a "proper" district must be within the state;[12] others deny it.[13] Some of those who say it must be within the state, so circumscribe the additional conditions that though the right of removal is explicitly granted by terms satisfied in every respect by a suit in question, the conditions judicially imposed to ascertain the "proper" district cannot be fulfilled, and because when so conditioned no "proper" district can be found, the right explicitly granted is annulled; and one who has the statutory right of removal cannot find any district answering the various conditions for identification of the district. The conditions being largely accidental in the different cases, it is fair to assume that Congress never conceived that having enlarged the right by the granting clause, it was nullifying it in a vast number of cases by using the word *proper*.

There was, however, no sound reason for this misconception of the word "proper," for the proper district was actually described in the procedural section of the Act of 1875 in precisely the same words as had always been used—"the district where such suit is pending." So that if the two sections relating to the same subject-matter, formerly one section only, were now construed together, there was no more reason for doubt as to the proper district after 1875 than there had ever been before. The proper district before, when it had not been described as *proper*, was the district where such suit was pending; the designation of it as the "proper" district in the section granting the right, and as "the district where such suit is pending," in the section prescribing the procedure, sufficiently and accurately identified the two districts as one. But the courts, or many of them, have not recognized the proper district by this description; they have been confused by the fixing of another proper district for a wholly different purpose. It seems a curious perversity of reasoning which, having such an easy method of discovering the proper district by studying the history of the removal acts and the persistency of the indication of the proper district, as that where the suit was pending (in the state court), for the courts to scan some other section for the definition of *proper* district and to find it in the section indicating the district where a suit can be brought by *original* process, and thus to nullify a large part of the privilege of removal, by finding by this cross-reference to another definition such a limitation of proper district that the double condition in a very large number of instances cannot be fulfilled, and then there is no district which can be the proper district, though the suit is of a character for removal and might at the option of the plaintiff have been instituted in a federal court. The fundamental mistake, which has guided many judges, but has been abhorrent to the reasoning powers of many others, is the contention that the statute by defining the district in which suit can be brought by *original* process, intended to limit by this condition the district of removal, when it specifically designated the latter as the district where the suit was pending. And this reasoning appears all the more perverse because the law itself (Section 5—Ch. 137—1875) further distinguished *commencing* a suit in a Circuit Court from removing it.

(12) New York Coal Co. v. Sunday Creek Co., 230 Fed. R. 295.

(13) Mattison v. Boston & M. R. R., 205 Fed. R. 821; Park Sq. Automobile Station v. Amer. Locomotive Co., 222 Fed. R. 979 (see 244 U. S. 412); Stewart v. Cybur Lumber Co., 211 Fed. R. 343.

The Acts of 1887, Ch. 373, and 1888, Ch. 866, are usually regarded as substantially one; they are practically identical, the latter having been passed to correct a series of clerical errors in the former.

This act was intended to restrict the quantity of litigation in the United States courts, and judges have assigned this purpose, as reason why they should so restrict the plain letter of the law, as to considerably curtail its beneficent purposes. The restriction was accomplished by raising the jurisdictional amount, by eliminating as a district for suit by original process, in a controversy between citizens of different states, the district where the defendant might be found if no party was a resident of the district, and by destroying the plaintiff's right of removal.

Many courts have, however, extended the recognized purpose of the law, to restricting the right of removal, so that if a suit could not have been brought originally in the federal court of a district, it cannot be removed in such district, though such district is the one where the suit is pending in the state court. This restriction, which is a work of construction, and has led to the confused contrariety of decisions, is derived from the substitution of one phrase for another in the description of the suit which can be removed. In the former laws it was "a controversy between citizens of different states"—substantially the language of the Constitution; by this law this phrase was substituted by the longer expression:

"Any other suit of a civil nature at law or in equity of which the circuit courts of the United States are given jurisdiction by the preceding section."

By the preceding section, it is contended, on the one hand, that these courts were given jurisdiction of a controversy between citizens of different states in which the matter in dispute exceeded exclusive of interest and costs the sum or value of $2000. And so long as the jurisdiction so accorded is so construed, there is no difficulty in determining what suits are removable, nor to what district, for while this act still used the term *proper* district, perpetuated from the Act of 1875, the procedural section still indicated this district, as the district in which the suit was pending (in the State Court). So construed there was both a harmony and a historical persistency about the right of removal. But many judges still measured the place of removal by the place in which the suit might originally have been brought, and denied removal if the suit could not have been brought in the Federal Court in the State. This was because it was at first supposed that if a suit was brought in a federal district of which neither party was a resident, the jurisdiction had not been granted, and hence as no suit could be removed to a federal court of which it was not granted jurisdiction, no suit could be removed into a federal court unless the plaintiff or defendant was a resident of the district.[14] This argument was logically sound, if the premise was right, but it has since been determined that the right to object to the district is a personal privilege, and that the federal courts, as such, have the jurisdiction as a whole, but the court in a particular district cannot proceed if this personal privilege is properly urged.[15] Here again arises a judicial conflict—the privilege in the section which confers it, is not a plaintiff's but a defendant's—it is the person's against whom the suit is brought by original proceeding. Now the suit is never brought against the plaintiff, hence, in the kind of suit described in the section granting the personal privilege, the plaintiff could never be in the position to claim the privilege; and the removal section, prescribing procedure, still said that the petition should ask the removal into the district where the suit was pending; therefore, by a proper logic it might be argued that the plaintiff has no privilege to ob-

(14) In re Wisner, 203 U. S. 449 (frequently criticised—probably overruled).

(15) In re Moore, 209 U. S. 490.

ject to the removal of a suit of which the federal courts have jurisdiction into the court of a district in which the suit was instituted by him in a state court. And many judges have so held,[16] but others maintain upon various grounds that a plaintiff has a veto power upon the defendant's right of removal if the district in which the suit is pending in the state court is not the residence of plaintiff or defendant.[17] The grounds assigned vary in different courts, some say it is because the court has no jurisdiction if the plaintiff objects to proceeding before it, though if he does not object, the court has jurisdiction. It would seem that if the court has jurisdiction at any time, it has jurisdiction at all times, and that the plaintiff's consent does not confer jurisdiction: the law confers jurisdiction of the subject-matter; jurisdiction of the person is acquired by service of process; the privilege of not proceeding may be urged by the person to whom it is granted, but it is not granted to a plaintiff, while the privilege of removal to the specific district where the suit is pending is expressly conferred upon the defendant and the veto power is not conferred upon the plaintiff. Many decisions have taken this view; many have repudiated it. It seems to me unanswerable.

Other courts have argued that *proper* district refers to the district where the suit might have been originally instituted by the plaintiff as matter of absolute right, and without the privilege of objecting on the part of the defendant that he could not be sued in such district. But the argument already adduced answers this argument, and several decisions concede it.

Still other courts, recognizing that the grant would be grotesquely limited, if limited by the double condition, that the district of removal should be both the district where the suit is pending and the residence of plaintiff or defendant, have disregarded the plain designation of the proper district as the one where the suit is pending, in favor of the right to remove to another, if it is the residence of a party.[18]

Still others have recognized the right of a defendant to remove to the district where the suit is pending, with a countervailing right of the plaintiff to procure remand if it is not the residence of a party, but with the right to retain jurisdiction if the countervailing right is waived.

It seems to me that the true position is that the right is conferred on the defendant if the suit is of the character which might have been instituted in a federal court by the plaintiff; that the proper district is the one where the suit is pending; that no other district is prescribed; that the district of residence is immaterial; and that if the character of suit is as prescribed for removal and the removal is to the district where pending in the state court, the plaintiff has no privilege, the court has jurisdiction, and should retain it.

We have thus traced the substantial history of the removal statutes; there was some rearrangement, but, no substantial change in the Judicial Code.

The confusion in administration has arisen from a neglect of historical analysis; this confusion is now so great that only a revision of the statute can be an effective remedy; and it would seem that in any such revision the guiding principle ought to be that defendants should have the same right to appeal to the judicial power of the United States for defense, as plaintiffs for attack.

CHARLES A. BOSTON.
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(16) Louisville & Nashville R. R. Co. v. Western Union Tel. Co., 218 Fed. R. 91, and other cases cited in Note 8 above.

(17) Cases cited in note 7 above. Guaranty Trust Co. v. McCabe, 250 Fed. R. 699 (see 38 Sup. Ct. Rep. 427).

(18) See Note 13.

BILLS AND NOTES—INDORSEMENT WITHOUT RECOURSE.

MILLER v. STEWART et al.

Court of Civil Appeals of Texas. Ft. Worth. June 7, 1919.

214 S. W. 565.

An indorser "without recourse in any way" is liable to bona fide holder of note executed by husband and wife, and taken on strength of wife's signature, which was a forgery, the indorser warranting the genuineness of her signature.

CONNER, C. J. J. C. and F. L. Stewart instituted this suit against T. S. Stanfield and his wife, Jettie Stanfield, as makers, and H. L. Miller as indorser of a promissory note for $750 owned by the plaintiffs. In behalf of T. S. Stanfield, it was alleged that he was an enlisted soldier in the service of the United States in foreign lands, and as to him the suit was abated. Mrs. Stanfield pleaded that her name on the note was a forgery, and this fact being established, she was discharged, and there is no complaint here made of the disposition of the case as to the Stanfields. H. L. Miller, however, pleaded that he had transferred and indorsed the note to the plaintiffs "without recourse in any way," and it was so shown by the indorsement and so found by the jury in answer to a special issue. Nevertheless the plaintiffs were awarded a judgment as prayed for, and the indorser, Miller, has duly appealed.

It was shown at the trial that T. S. Stanfield was financially irresponsible at all times involved, and that the note was worthless without the wife's genuine signature, and the question presented here is whether appellant is to be held as warranting the genuineness of Mrs. Stanfield's signature to the note, notwithstanding the terms of his indorsement. We have concluded that we cannot disturb the trial court's judgment, which in effect so affirms.

The general rule in cases of the ordinary indorsement of a promissory note "without recourse" is thus stated in 1 Daniel on Negotiable Instruments, § 670:

"When the indorsement is 'without recourse' the indorser specially declines to assume any responsibility as a party to the bill or note; but by the very act of transferring it he engages that it is what it purports to be—the valid obligation of those whose names are upon it. He is like a drawer without recourse, but who is nevertheless liable if he draws upon a fictitious party or one without funds. And therefore the holder may recover against the indorser 'without recourse' (1) if any of the prior signatures were not genuine; or (2) if the note was invalid between the original parties, because of the want or illegality of the consideration; or if (3) any prior party was incompetent; or (4) the indorser was without title."

See, also, 7 Cyc. 833, and 35 Cyc. 396.

It is not to be doubted that an indorser may by contract relieve himself from liability because of a want of the genuineness of the signatures to a note transferred by him, but there is no finding by the court or jury that on the occasion of appellant's transfer of the note under consideration that he expressly declined to guarantee the genuineness of the signatures to the note. Appellant insists that this is necessarily to be implied from the broad terms of the indorsement. It is true that the terms "without recourse in any way" seem sufficiently broad to include a refusal to be bound for the payment of the note even though the signatures might not be genuine. But we do not think that this is necessarily so. Appellant himself testified that at the time he made the indorsement he did not have in mind the question of whether the signatures to the note or either one of them had been forged; that he just assumed that they were genuine. It was said, in speaking of a general indorsement by the court in the case of Bell v. Dagg, 60 N. Y. 528, and cited in 6 Ann. Digest, p. 718, that, "if nothing has been said in respect to the genuineness of the note, a general refusal to guarantee might well have been understood as confined to the responsibility of the maker." We think the implication suggested by the New York decision should certainly be indulged in this case, for not only did appellant testify, as stated, that at the time of the indorsement he assumed the signatures to the note to be genuine, but one of the appellees testified specifically that appellant, in discussing the matter of transfer, expressly stated that Mrs. Stanfield "signed the note." While this statement was denied by appellant, we must assume that they credited it. If so, for yet another reason, it can be said that appellant, notwithstanding the general terms of his indorsement, will not be allowed to escape liability. There was evidence sufficient to support a finding that appellees in good faith purchased the note, giving full value therefor, without any notice that the name of Mrs. Stanfield had been forged. It was alleged in appellees' petition that the statement that Mrs. Stanfield had signed the note was an inducement to their acceptance of it, and to now hold that, notwithstanding

the statement, appellant may invoke the terms of his indorsement to escape liability, would be to give effect to fraud, and it is a familiar principle that fraud will vitiate any contract. See Young v. Carcroft, 168 S. W. 392; Wells v. Driskell, 149 S. W. 205; Benton v. Kuykendall, 160 S. W. 438; 1 Daniel on Negotiable Instruments, § 722.

We conclude that all assignments of error should be overruled and the judgment affirmed.

NOTE—*Indorser "Without Recourse" Guarantees Regularity and Genuineness.*—In State ex rel. v. In Corning Sav. Bk., 139 Iowa 338, 115 N. W. 937, the Supreme Court said in speaking of lia- "without recourse:" "Very little paper comparatively passes on indorsement 'without recourse,' and even this does not obviate the liability involved in the warranty of genuineness of title and of title. If appellee's view should prevail, every one in taking paper from a savings bank must not only receive it indorsed 'without recourse,' but must know at his peril whether the paper is genuine and the bank has title, as well as that the object of the officers of the bank in disposing of it was 'for the purpose of obtaining money with which to pay deposits.'"

In Carroll v. Nodine, 41 Ore. 412, 69 Pac. 51, 93 Am. St. Rep. 743, the facts show that plaintiff sued defendant on a warranty of a note sold without recourse. There were indorsed on the note certain payments, which if made would have prevented the running of the statute of limitations. But in a suit on the note defendant showed the payments were never made and the note was in fact barred. It was said: "The liabilities of an ordinary or unqualified indorser are upon the instrument indorsed, conditioned upon demand and notice; but where the transfer is by indorsement, without recourse, or by delivery, the vendor's liabilities arise from the fact or contract of sale, and not upon the paper. The purpose of such an indorsement is simply to carry title to the purchaser. * * * The authorities are in unison, however, that where a note is thus transferred there is an implied warranty by the seller that it is what it purports to be, and, as applied to the exigencies of this case, that no payments have been made, except those that appear to have been indorsed thereon, and that such as appear are genuine, and operate to continue the obligation in force as against the statute of limitations."

In Drennan v. Bunn, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354, there is quoted from 1 Daniel on Neg. Inst. the same section as in the instant case to a case of deficiency in amount apparently due according to face of an instrument, and where this is reduced by defense of usury, which defeated interest.

In Ticonic Bank v. Smiley, 27 Me. 225, 46 Am. Dec. 593, an indorser without recourse was held liable to his vendee where he sold an overdue note to the extent of a credit to which maker was entitled, but which did not appear on the note.

In Challiss v. McCrum, 22 Kan. 157, 31 Am. Rep. 181, Brewer, J., held as to defect for usury that there was an implied warranty against such a defect. It was known to vendor of the note and arose out of his own dealings with the maker of the note.

Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 657, 9 Am. St. Rep. 708, was a case where a note was sold by indorsement without recourse. Two hours prior to the sale the makers made a voluntary assignment, neither the seller nor buyer knowing of this at the time, the sale being through a broker. The Court affirms the principle of implied warranty of genuineness, but the circumstances of the sale in no way affected the principle that there was no warranty of solvency of the makers.

The instant case is possibly a stronger illustration of the principle discussed, than is any of the cases cited in this note. A forged note is nothing in fact in the way of a valid document; and cases we have cited refer to circumstances not necessarily involving crime. If the rule of warranty is good as to them, *a fortiori* would it apply to the instant case. C.

## HUMOR OF THE LAW.

"Here's a blank form."

"What for?"

"Sort of business questionnaire. The boss wants you to tell what you do around the office."

"Gimme six blanks."—*Pittsburg Sun.*

Judge: "Have you ever seen the prisoner at the bar, Joshua?"

"No, sah, Judge. I ain't never seen him dere, but I powerfully s'pected sometimes dat he'd been dere."—*Lawyer and Banker.*

An amateur authoress who had submitted a story to a magazine, after waiting several weeks without hearing from the editor concerning it, finally sent him a note requesting an early decision, as she stated "she had other irons in the fire."

Shortly after came the editor's reply: "Dear madame—I have read your story, and I should advise you to put it with the other irons."—*Punch.*

His Better Half (regarding him from the bedroom window). "Where you bin this hour of the night?"

"I've bin at me union, considerin' this 'ere strike."

"Well, you can stay down there an' consider this 'ere lockout."

# WEEKLY DIGEST.

**Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.**

*Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.*



1. **Adverse Possession**—Priority.—Actual possession establishes presumption of title and right to possession in an ejectment suit which can only be overcome by proof of anterior possession or title from a paramount source.—Western California Land Co. v. Welch, Cal., 183 Pac. 169.

2. **Bankruptcy**—Common Law Rights.—As to fraudulent or avoidable transfers by bankrupt, the trustee in bankruptcy is in no better legal position than the creditors whom he represents; his right to avoid the transfer being merely that of the creditor's common-law right.—Scales v. Holje, Cal., 183 Pac. 308.

3.——Insolvency.—A defendant held to have had knowledge that a bankrupt was insolvent at the time it took back property previously sold to him, which rendered the transaction a preference.—Egner v. Parshelsky Bros., U. S. C. C. A., 258 Fed. 238.

4.——Preference.—A purchaser of corporate property within four months prior to adjudication in bankruptcy who complied with a request of the seller's president and general manager by applying a portion of the purchase price toward discharging personal debts incurred for the corporation's benefit cannot be required to make such payments a second time to the corporation's trustee in bankruptcy.—Doughty v. Moors, Cal., 183 Pac. 199.

5.——Preferred Claim.—Trustee in bankruptcy of a private banker cannot retain money given bankrupt for transmittal, although Banking Law N. Y. § 156, gives depositors for transmittal preferred claims against certain of banker's assets and authorizes them to also share pro rata with general creditors.—In re Jarmulowsky, U. S. C. C. A., 258 Fed. 231.

6.——Proof of Claim.—Proving of claim in bankruptcy is not an election of a remedy.—Beyer v. Sadvoransky, N. Y., 177 N. Y. S. 705.

7.——Voluntary Petition.—Where, on a voluntary petition in bankruptcy filed by officers and directors of a corporation acting in violation of the orders of the state court which had appointed a receiver, the referee in bankruptcy appointed a receiver, held that the receiver of the state court will be directed to apply to the judges of the federal court to vacate the order appointing the receiver, and will be directed, until such application, to retain control of the assets.—Cavagnaro v. Indian Tire & Rubber Co., N. J., 107 Atl. 643.

8. **Banks and Banking**—National Bank.—A national bank may borrow money and issue evidence of indebtedness therefor.—Ellis v. Citizens' Nat. Bank of Portales, N. M., 183 Pac. 34.

9.——Vice Principal.—One who is cashier and manager of the affairs of a bank is its vice principal, and his acts are the acts of the bank whenever he is acting in the interest and on the behalf of such bank, whether such acts actually take place within the bank or elsewhere.—Ravinia State Bank v. Kirkpatrick, S. D., 173 N. W. 863.

10. **Beneficial Associations**—Suspension of Member.—The publication and general circulation by a subordinate lodge of the Knights of Pythias of a circular charging "shocking conditions," tyrannical usurpation of power, misappropriation of funds, etc., by the Supreme Lodge, held substantial ground for its suspension.—Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia v. Grand Lodge of Knights of Pythias of North America, South America, Europe, Asia, and Africa, D. C., 258 Fed. 275.

11. **Bills and Notes**—Burden of Proof.—The burden of proof is always upon the holder of a promissory note, seeking to enforce it, to show that it was duly presented, and that notice of dishonor was given any indorser sought to be held.—Kahnweiler v. Salomon, N. Y., 177 N. Y. S. 739.

12.——Option.—Where a note payable five years from date contains the clause, "due if ranch is sold or mortgaged," the quoted clause is not self-executing, but merely confers option upon holder to treat debt as due if contingency occurs.—Nickell v. Bradshaw, Ore., 183 Pac. 12.

13. **Brokers**—Commission.—Vendor, having agreed to pay broker commission pro rata upon payment of purchase price, is required to act in good faith and do nothing to prevent, discourage, or emabarrass the completed purchase of the property and do everything possible to aid in securing the purchase price.—Ratzlaff v. Trainor-Desmond Co., Cal., 183 Pac. 269.

14. **Certiorari**—Appeal.—Proceedings on certiorari are of appellate nature, though not pursued in ordinary and technical form of appeal.—Dixon v. Second Judicial District Court in and for Dashoe County, Nev., 183 Pac. 312.

15.——Pre-maturity.—Certiorari will not issue to review a proceeding by an inferior tribunal prior to court's final adjudication.—Frost v. Superior Court in and for Modoc County, Cal., 183 Pac. 206.

16. **Chattel Mortgages**—Bill of Sale.—An instrument reciting receipt of certain machinery from plaintiff and notes for the balance due, and providing for a retention of title until payment of notes and charges in event of foreclosure, that on default or sale by buyer all notes should be payable and plaintiff entitled to immediate possession, and for plaintiff's bill of sale on payment of notes, was a conditional bill of sale, and not a mortgage, within Gen. St. 1906, § 2494.—Dodson Printers' Supply Co. v. Corbett, Fla., 82 So. 804.

17.——Lien.—Purchaser of automobile subject to a chattel mortgage acquires no greater rights than those possessed by mortgagor, and is in no position to deny validity of mortgage.—First Nat. Bank v. Northwest Motor Co., Wash., 183 Pac. 81.

18.——Validity between Parties.—A chattel mortgage is valid between the parties without being witnessed.—Lankford v. First Nat. Bank, Okla., 183 Pac. 56.

19. **Conspiracy**—Concealment of Property.—Insolvent debtors can be guilty of conspiracy to hide their property, so that their creditors cannot reach it through bankruptcy proceedings, which the debtors are expecting to be instituted; it not being necessary that at the time of the conspiracy the proceedings should be pending and a trustee appointed.—Meyer v. United States, U. S. C. C. A., 258 Fed. 212.

20. **Constitutional Law**—Delegation of Power.—The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying the law.—Bailey v. Van Pelt, Fla., 82 So. 789.

21. **Contracts**—Consideration.—There must always be consideration to support a valid promise.—Bennett v. Potter, Cal., 183 Pac. 156.

22.——Interpretation.—A contract, whether construed according to its terms or in the light

of circumstances surrounding its making, should be interpreted in accordance with the plain import of the language used.—Vollmer v. Wheeler, Cal., 183 Pac. 264.

23.——Writing and Printing.—When a contract is in part printed, and in part written or typewritten, the printed part is to be given the effect called for by its language, except in so far as inconsistent or incompatible with the written or typewritten part.—The Addison E. Bullard, U. S. C. C. A., 258 Fed. 180.

24. **Conversion**—Equity.—A testamentary direction to a trustee to sell real estate for a specified purpose is not an equitable conversion for the general purposes of the will.—In re Burden's Estate, N. Y., 177 N. Y. S. 748.

25. **Corporations**—Dividend.—Assets of dissolved corporation which board of directors authorized to be distributed to its stockholders according to law was not a dividend, a "dividend," when spoken of in reference to an existing corporation and not one being closed up and dissolved, being funds which the corporation sets apart from its profits to be divided among its members.—Rossi v. Rex Consol. Mining Co., Wash., 183 Pac. 120.

26.——Residence.—The residence of a corporation is in the state under whose laws it is incorporated.—Ryan v. Inyo Cerro Gordo Mining & Power Co., Cal., 183 Pac. 250.

27.——Stockholder.—Where a stockholder indorsed his certificate of stock in blank and later it was found among the effects of one recently deceased who had never had it transferred to himself on the books of the company, and who during all the time had knowingly permitted the stockholder to vote the stock, etc., held, that the presumption of ownership that would have arisen from possession and indorsement of the certificate was rebutted.—Stoltz v. Carroll, Ohio, 124 N. E. 226.

28. **Courts**—Law of the Case—A question of law, once decided in a cause, will not be reexamined in the same case, except on a motion for rehearing.—Tucker v. Lowe, N. H., 107 Atl. 641.

29. **Damages**—Prospective Profits.—Prospective profits lost by a breach of contract are recoverable if they can be estimated with reasonable certainty.—Nelson v. Davenport, Wash., 183 Pac. 132.

30. **Deeds**—Delivery.—Delivery of a deed, to be valid, must be such as deprives the grantor of the possession and control of the instrument. —Houck v. Houck, Ore., 183 Pac. 3.

31. **Elections**—Legislative Advice.—A joint resolution by the Legislature, purporting to empower election boards to provide separate ballot boxes for women, conferred no additional power on election officers, but may be considered as an expression of legislative advice and opinion that election officers already had necessary power to take such steps.—Vertrees v. State Board of Elections, Tenn., 214 S. W. 737.

32.——Primary Election.—A candidate in the primary for nomination for alderman in the borough of Brooklyn may sign his own petition. —In re Gallo, N. Y., 177 N. Y. S. 732.

33. **Electricity**—Acceptance of Contract.—Where price of electric current for light and other purposes is fixed by ordinance for time not exceeding ten years and the company files in office of auditor or clerk of corporations its written acceptance, such ordinance and acceptance constitute a contract between municipality and company binding on both parties during the fixed period.—Ohio River Power Co. v. City of Steubenville, Ohio, 124 N. E. 246.

34.——Licensee.—A fireman who was killed by coming in contact with live wires of an electric company while climbing a ladder to aid in fighting a fire was not a mere licensee as to the electric company occupying with its wires the public street.—City of Shreveport v. Southwestern Gas & Electric Co., La., 82 So. 785.

35. **Embezzlement**—Larceny.—A transfer wagon driver, who wrongfully converted sugar while hauling it from a railroad station, held guilty of larceny, and not embezzlement.—Weisberg v. United States, D. C., 258 Fed. 284.

36. **Eminent Domain**—Diminution of Value.—Compensation in eminent domain includes the sum of the diminution in value of part not actually taken, of a parcel of land in part taken. —Van Etten v. City of New York, N. Y., 124 N. E. 201, 226 N. Y. 483.

37. **Evidence**—Fraud, Accident and Mistake.—A party setting up a contemporaneous written agreement varying the terms of written instrument sued or defended upon has burden of averring that any alleged omission resulted from fraud, accident, or mistake.—Federal Sales Co. of Philadelphia v. Farrell, Pa., 107 Atl. 668.

38. **Exchange of Property**—Annulment.—One cannot have a contract for exchange of land for corporate stock annulled on the ground that the other party made false representations, where such representations were not relied on. —Arendt v. McConnell, 183 Pac. 202.

39. **Executors and Administrators**—Equitable Interest.—Even though beneficiaries under a clause of a will directing a sale of property and distribution of the proceeds have only an equitable interest in the property, and not legal title to it, they may make an election to take the property and dispense with the sale.—Brooklyn Trust Co. v. Kernan, N. Y., 177 N. Y. S. 717.

40.——Jurisdiction.—Where letters of administration in due form have been issued by order of a court having jurisdiction, the administrator's right to sue as such cannot be collaterally attacked on ground that his oath was not sufficient in form.—Bank of Commerce & Trust Co. v. Humphrey, Cal., 183 Pac. 222.

41. **Food**—Standard Size of Bread.—An ordinance, fixing standard sizes of bread loaves and requiring loaves to be of one pound avoirdupois as the minimum weight which might be made and sold by a baker, is not an unreasonable or arbitrary exercise of police power, and is constitutionally valid.—Allion v. City of Toledo, Ohio, 124 N. E. 237.

42. **Frauds, Statute of**—Landlord and Tenant. —Where a tenant under a written lease for one year holds over and pays rent to the landlord, a new lease for a year under the terms of the old lease is created by law, and not by the agreement of the parties, which is not affected by Real Property Law, § 232, as amended by Laws 1918, c. 303, § 1, providing that an agreement for the occupation of real estate in the city of New York shall create a tenancy from month to month, unless the duration of occupation shall be specified in writing.—Souhami v. Brownstone, N. Y., 177 N. Y. S. 726.

43. **Gifts**—Statute of Frauds.—Where a mother conveying realty to her son never surrendered its possession, but continued to act as owner until her death, and her executor did the same, her verbal promise to the son that he might retain the property as his own was within the statute of frauds, and void.—Hatcher v. Hatcher, Pa., 107 Atl. 660.

44. **Homicide**—Instruction.—Where victim of a homicide was shot both through the head and body, his ears severed, one eye gouged out, his head and face frightfully mangled, his body dragged 40 yards down a bank, leaving a trail of blood, and there abandoned in the night, court's remark as to importance of case to commonwealth, and to defendant, and that it would certainly appear that some one was guilty of a most heinous crime, was not improper.— Commonwealth v. Bednorciki, Pa., 107 Atl. 666.

45.——Presumption as to Degree.—A charge that the presumption is that one who commits an illegal homicide is guilty of murder in the second degree, and that the burden is on the commonwealth to show such facts and circumstances as will raise the offence to murder in the first degree, was correct.—Commonwealth v. Bednorciki, Pa., 107 Atl. 666.

46. **Husband and Wife**—Support and Maintenance.—A wife may maintain an action against her husband for support and maintenance without applying for divorce, under St. 1913, c. 97.—Hilton v. Second Judicial District Court in and for Washoe County, Nev., 173 Pac. 317.

47. **Injunction** — Employment.—An employer may enjoin third persons from inducing employes, by threats or otherwise, from breaching their contracts of employment.—Patterson Glass Co. v. Thomas, Cal., 183 Pac. 190.

48. **Insurance**—Accident.—Failure of accident insurance policy requiring notice of injury to insurer within ten days to specifically include an exception where such notice "may be shown not to have been reasonably possible" was of little or no importance; such an exception being implied.—American Casualty Co. v. Roehm, Ohio, 124 N. E. 225.

49.——Contract.—Provision in a policy, insuring against bodily injuries, that written notice should be given insurer within 30 days from injury is of the essence of the contract, and like other contracts should be construed so as to give effect to intention and express language of parties.—Employers' Liability Assur. Corporation v. Roehm, Ohio, 124 N. E. 223.

50.——Fidelity Insurer.—A fidelity insurer is not liable for any acts of fraud or dishonesty committed by the employe, after the employer became aware of any act which might be made the basis of a claim.—Los Angeles Athletic Club v. United States Fidelity & Guaranty Co., Cal., 183 Pac. 174.

51.——Limitation on Agent.—Provisions in a policy of life insurance limiting authority of agent and providing that agent has no authority to accept renewal premiums or accept notes, or grant extensions, etc., may be waived or modified by the insurer.—Hinkson v. Kansas City Life Ins. Co., Ore., 183 Pac. 24.

52. **Judgment**—Description of Land.—Judgment held not void for lack of sufficient description of land involved where it was apparent from the judgment by reversing the calls, that the beginning call for Twenty-third street was a mistake, and that Twentieth street was meant.—Pearson v. Lloyd, Tex., 214 S. W. 759.

53.——Res Judicata.—To make a matter res adjudicata there must be identity in the thing sued for, identity of the cause of action, identity of the persons, and identity of the quality in the persons for or against whom the claim is made.—Hill v. Buckholts, Okla., 183 Pac. 42.

54. **Landlord and Tenant**—Invitee.—One whom the owner of a building impliedly invites to enter and do business with his tenants has privileges in the premises, and can recover for personal injuries caused by the owner's negligence, and can enjoin the latter from interfering with his right of entry.—Konick v. Champneys, Wash., 183 Pac. 75.

55. **Libel and Slander**—Alienation of Affections.—Alienation of affections cannot be set up by defendant in a libel case in justification, the truth of the charges being the only allegation proper under such a claim; the law requiring that the justification be as broad as the charge.—Ellis v. Wood. N. Y., 177 N. Y. S. 730.

56. **Limitation of Actions**—Installments.—Action to recover installments due under written contract was barred for failure to bring action within four years after installments became due, under Code Civ. Proc. § 337, subd. 1, though defendant was in hands of a receiver, and permission from court to bring action was obtained within the four-year period.—People v. Magee, Cal., 183 Pac. 289.

57.——Running of Statute.—In an action for a breach of contract of a surgeon for the treatments of a patient, the statute of limitations (Gen. Code, § 11225) does not begin to run until the contract relation is terminated.—Bowers v. Santee, Ohio, 124 N. E. 238.

58. **Malicious Prosecution**—Probable Cause.—A judgment of conviction is not evidence of probable cause in an action for malicious prosecution, where based upon testimony which was untrue, regardless of whether or not such testimony was given unlawfully and corruptly.—Kennedy v. Burbidge, Utah, 183 Pac. 325.

59. **Mandamus**—Equity.—Mandamus is awarded, not as a matter of right, but in the exercise of a sound judicial discretion, and upon equitable principles.—United States v. Burleson, D. C., 258 Fed. 282.

60. **Master and Servant**—Assumption of Risk.—A servant is deemed to have assumed the risk when he knows, not only the defects in instrumentalities used by him, but the dangers and risks arising therefrom.—Thompson v. Southern Pac. Co., Cal., 183 Pac. 153.

61.——Assumption of Risk.—Though a coal miner impliedly waives compliance with Rev. Laws 1910, §§ 3983, 3984, requiring mine operator to furnish sufficient props, and agrees to assume the risk by continuing in service, a court will not recognize or enforce such agreement, as to do so would nullify the statutes and be against public policy.—Whitehead Coal Mining Co. v. Schneider, Okla., 183 Pac. 49.

62.——Respondeat Superior.—A conditional vendee and lessee of a motortruck, who is under a contract of employment to haul coal for the lessor, who has no right to control and direct the manner in which the hauling should be done, is an independent contractor, for the negligence of whose servants the lessor is not liable.—Luckie v. Diamond Coal Co., Cal., 183 Pac. 178.

63.——Safe Appliances.—It is the master's duty to furnish servants with reasonably safe appliances.—Lund v. Griffiths & Sprague Stevedoring Co., Wash., 183 Pac. 123.

64.——Workmen's Compensation Act.—A settlement made by a workman with his employer and the latter's insurer for an injury within the Workmen's Compensation Act on the mutual assumption that he was entitled to compensation for the loss of one eye only and a release executed on such assumption do not bar him from thereafter claiming compensation for injury to the other eye.—State v. District Court, Seventh Judicial Dist., Minn., 173 N. W. 857.

65. **Money Received**—Action for.—The action for money had and received will lie wherever it appears that defendant has received money which in equity and good conscience he should pay to plaintiff.—M. H. Hoffman, Inc., v. Bernstein Film Production, Cal., 183 Pac., 293.

66. **Mortgages**—Deed.—A deed absolute in form, or any other conveyance, must be construed to be a mortgage subject to redemption where it is made manifest from a consideration of all surrounding facts and circumstances that the parties thereto intended the conveyance to operate only by way of security.—Smith v. Headlee Ore., 183 Pac. 20.

67.——Foreclosure.—The general rule is that any error in a notice of mortgage foreclosure sale that will naturally mislead the public or deter persons from bidding will render a sale irregular.—Loomis v. Stoddard, S. D., 173 N. W. 859.

68.——Release.—Release of a mortgage, not delivered by the mortgagee in his lifetime, did not take effect.—Musgrave v. Renkin, Cal., 183 Pac. 145.

69. **Municipal Corporations**—Automobile.—While an automobile may have a slightly superior right of way between crossings, or the measure of care may not be as high as at regular crossings, yet when a driver sees, or with reasonable care might see, a pedestrian in time to avoid a collision, he must do so, and if he does not he is liable for resulting injury.—Anderson v. Wood, Pa., 107 Atl. 658.

70.——Charter Powers.—When a city has adopted a charter under which it is authorized to exercise all powers of local self-government pursuant to Const. art. 18, §§ 3 and 7, the authority to locate, establish, and protect the streets within its limits resides in the municipality, and it may adopt and enforce such reasonable regulation as it deems proper.—Froelich v. City of Cleveland, Ohio, 124 N. E. 212.

71.——Contributory Negligence.—One is not guilty of contributory negligence in attempting to rescue another placed in peril by the negligent act of third persons, unless he acts with a recklessness unwarranted by the judgment of a prudent man.—McClue v. Southern Pac. Co., Cal., 183 Pac. 248.

72.——Penal Ordinances.—Penal ordinances, or those restraining exercise of any trade, occupation, or business, or restricting the use, management, or alienation of private property, will be strictly construed, and not extended to include limitations not therein clearly prescribed, and exemptions from such restrictive provisions are also liberally construed.—State v. Dauben, Ohio, 124 N. E. 232.

73. **Novation**—Original Debt.—A necessary element in novation, where there is a substitution of a new debtor, is the extinguishment of the original debt, and the complete release of the debtor.—Mills v. McMillan, Fla., 82 So. 812.

74. **Perpetuities**—Inalienability.—Where testator devised his property and the income to his wife for life, and over to such children as had never married and to a son J., and gave his children the common use of the homestead, his direction that executor use income from estate to maintain the homestead did not create such a trust as would be inalienable under Personal Property Law, § 15.—In re Stanton's Will, N. Y., 177 N. Y. S. 743.

75. **Principal and Agent**—Architect.—Architect is not, as such, a general agent, and persons dealing with him are bound by the general rules of agency.—Columbia Security Co. v. Aetna Accident & Liability Co., Wash., 183 Pac. 137.

76.——Exclusive Agency.—While the conduct of plaintiffs in continuing their exclusive agency contract for the sale of defendant's goods waived defendant's alleged breach of contract, it did not preclude plaintiff's recovery of damages from such breach.—Hoffer v. Hooven-Owens-Rentschler Co., N. Y., 177 N. Y. S. 720.

77.——Indicia of Authority.—A purchaser is warranted in paying purchase price to seller's agent if the agent is in fact authorized to receive payment, or the seller has clothed him with indicia of authority to receive payment, as by intrusting him with possession of the goods. —Petersen v. Pacific American Fisheries, Wash., 183 Pac. 79.

78.——Scope of Agency.—A principal is bound, not only by an agent's acts within his actual authority, but also by acts within the agent's apparent authority.—Petersen v. Pacific American Fisheries, Wash., 183 Pac. 79.

79. **Principal and Surety**—Pledge.—Where plaintiff and defendant authorized their broker to pledge their securities as collateral for broker's indebtedness on a loan, each became to the extent of their pledge a surety for such indebtedness, and as between themselves co-sureties, even without agreement to that effect, and such relationship continued so long as both continued sureties for the same debt.—Unangst v. Roe, N. Y., 177 N. Y. S. 706.

80. **Railroads**—Negative Testimony.—Where there was no positive testimony that a whistle was sounded for the crossing at which plaintiff's automobile was struck by an interurban car, and the negative testimony, to the effect that the witnesses heard no approaching signal, but did hear a "little toot" when the motorman first saw the automobile, the question of negligence was for the jury.—Kent v. Walla Walla Valley Ry. Co., Wash., 183 Pac. 87.

81.——Negligence.—To recover for injuries to small boy climbing on a car in a train, caused by throwing a piece of coal at him and frightening him while getting down from the moving train, it is not essential to show elements of recklessness or of gross negligence, but proof of what under ordinary circumstances might be termed "mere negligence" is sufficient.—Minute v. Philadelphia R. Ry. Co., Pa., 107 Atl. 662.

82. **Sales**—Breach of Contract.—Any breach by plaintiff buyer of a contract provision requiring him to purchase seed for defendant seller was waived as a matter of law, where defendant retained a partial payment and kept the contract open for his own benefit for six months, without complaint regarding the alleged breach.—Lompoc Produce & Real Estate Co. v. Browne, Cal., 183 Pac. 166.

83.——Completed Contract.—Letters and telegrams transmitted through brokers regarding proposed sale of glycerine held not to establish a completed contract between the parties, in view of the fact that their minds did not meet on terms of payment, and that both parties expected to reduce the understanding to a more formal writing.—Marx & Rawolle v. Standard Soap Co., Cal., 183 Pac. 225.

84.——Sale by Sample.—Where goods are sold by sample, there is an implied warranty that they will at least equal in quality the sample.—American Mfg. Co. v. A. H. McLeod & Co., Fla., 82 So. 802.

85.——Warranty.—Acceptance of order for "export cured" codfish amounted to a warranty that goods, when packed for shipment, should measure up in regard to quality, to the full meaning of the term "export cured," although the word "warranty" was nowhere used.—Barrios v. Pacific States Trading Co., Cal., 183 Pac. 236.

86. **Schools and School Districts**—Board of Education.—A court cannot control the discretion vested in a board of education by statute, or substitute its judment for judgment of such board on any question it is authorized by law to determine.—Brannon v. Board of Education of Tiro Consol. School Dist. of Crawford County, Ohio, 124 N. E. 235.

87. **Statutes**—Prospective Operation.—Where a future time is named in an act when it shall become effective, it will speak and operate only from that time, unless a different intention is manifested.—Patterson Foundry & Machine Co. v. Ohio River Power Co., Ohio, 124 N. E. 241.

88. **Taxation**—Essential Right.—Right to tax is essential to the existence of government, and the legislative power in this respect can only be restricted by distinct and positive expressions in the Constitution.—Vertress v. State Board of Elections, Tenn., 214 S. W. 737.

89.——Locus of Property.—Under Const. art. 8, § 11, and Rev. St. arts. 7510, 7514, the proper place to tax personal property is the residence of the owner, provided it has not acquired a situs for purpose of taxation elsewhere, in which instance it is taxable where situated.—City of Galveston v. Haden, Tex., 214 S. W. 766.

90. **Trade-Marks and Trade-Names**—Exclusive Use.—The right to exclusive use of a trademark is not unlimited, and its use upon one or more commodities does not give the right to use it upon all, though the right is not confined to the precise species of goods to which the mark has been affixed, but extends to other goods of the same class.—Parsons Trading Co. v. Hoffman, N. Y., 177 N. Y. S. 713.

91. **Treaties**—Constitutionality.—A treaty relating to a proper subject of international negotiation which is not in conflict with any constitutional provision, nor subversive of fundamental rights, is valid, and may be made effective by apropriate legislation, although, if it were a statute, it would be unconstitutional, as affecting rights exclusively under control of the states.—United States v. Thompson, U. S. D. C., 258 Fed. 257.

92. **Trusts**—Dual Office.—A testator by his will naming the same persons as executors and trustees may create in such persons a dual capacity, that of executors and that of trustees. —State v. Beardsley, Fla., 82 So. 794.

93.——Trustee Ex Maleficio.—Where owner of realty, to protect herself from possible liabilities incurred for a son, conveyed to another son under an oral agreement to reconvey on demand, and to hold title for her protection and not as absolute owner, he held as trustee ex maleficio, and under Act April 22, 1856 (P. L. 533) § 4, and on his mother's death was bound to convey to persons entitled thereto as her residuary legatee.—Hatcher v. Hatcher, Pa., 107 Atl. 660.

94. **Vendor and Purchaser**—Essence of Contract.—In order to put in default the vendor in a contract of sale of land, under which payment of a certain part of the purchase price and delivery of the deed were dependent and concurrent conditions, and in which time was of the essence of the contract, the vendee must tender the purchase money.—Lemle v. Barry, Cal., 183 Pac. 150.

95.——Executory Contract.—While an unsatisfied judgment for an installment on an executory contract will be discharged of record if contract is terminated by vendor, installments paid may not be recovered.—Citizens' State Bank of Twin Valley v. Moebeck, Minn., 173 N. W. 853.

96.——Fraudulent Misrepresentation.—Where there has been no fraudulent misrepresentation as to the vendor's title, the fact that he has an imperfect title or no title at all at time of execution of a contract of sale does not invalidate the contract of sale; it being sufficient if vendor has good title at time he is called upon to perform.—Lemle v. Barry, Cal., 183 Pac. 148.

97.——Forfeiture.—Where contract provided for forfeiture of purchaser's rights thereunder upon failure to make payments when due, vendor's acceptance of payments while purchaser was in arrears created a temporary suspension of right of forfeiture.—La Chance v. Brown, Cal., 183 Pac. 216.

98. **Waters and Water Courses**—Riparian Rights.—The right of the owner of riparian land to the natural flow of water in a stream along the land is a corporeal hereditament and is an incident to and is annexed to the land as part and parcel of it.—Van Etten v. City of New York, N. Y., 124 N. E. 201, 226 N. Y. 483.

99. **Wills**—Residuary Estate.—A will whereby testator gave his executors the remainder of his property in trust to sell and convert into cash and to divide the proceeds among certain beneficiaries, there being no intention on the part of testator to create a trust, he having evidently meant that the named beneficiaries should have the residuary estate, did not create any trust.—Brooklyn Trust Co. v. Kernan, N. Y., 177 N. Y. S. 717.